

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY

VINEYARDS 3E HOLDINGS, L.L.C., :
Plaintiff :
 : C.A. No.: S16C-07-029-RFS
v. :
 :
REHOBOTH ART LEAGUE, Inc., :
Defendant :

ORDER

Upon Defendant's Motion to Dismiss. Granted.

Date Submitted: October 26, 2016

Date Decided: November 7, 2016

Tasha Marie Stevens, Esquire, Fuqua, Yori & Willard, P.A., 26 The Circle, P.O. Box 250, Georgetown, Delaware 19947, Attorney for Plaintiff

Mark F. Dunkle, Esquire, Parkowski, Guerke & Swayze, P.A., 116 West Water Street, P.O. Box 598, Dover, Delaware 19903, Attorney for Defendant

STOKES, J.

AND NOW TO WIT, this 7th day of November, 2016, upon consideration of Defendant's Motion to Dismiss, **IT APPEARS THAT:**

1. On August 25, 2016, Rehoboth Art League, Inc. ("RAL") filed a Motion to Dismiss pursuant to Superior Court Rule of Civil Procedure 12(b)(6).¹ For the following reasons the Motion to Dismiss is **GRANTED**.

¹ In Superior Court Rule of Civil Procedure 12, it is provided in pertinent part as follows:

(b) **How Presented.** Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counter-claim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defense may at the option of the pleader be made by motion:

(6) failure to state a claim upon which relief can be granted.

2. In October 2014, the Plaintiff, Vineyards 3E Holdings, L.L.C. (“Vineyards”), and the Defendant, RAL, entered into a five year commercial lease agreement. RAL paid all applicable rent, fees, and taxes through February 2016. In March 2016, RAL did not pay any part of the rent or fees due on the lease for that month. On March 24, 2016, Vineyards sent a letter to RAL giving it ten days to cure the default. The letter demanded that the March rent and fees be paid within ten days. If the default was not cured, the letter stated: “Pursuant to Section 27 and Section 28 of your lease agreement, in the event that you do not cure your default in total within TEN (10) days of the date of this letter, your lease with Vineyards 3E Holdings is hereby terminated as of April 4, 2016 (emphasis added).” After receiving the letter, RAL advised that it would be vacating the property. RAL did not pay any portion of the defaulted amount. Vineyards reentered the premises on March 31, 2016, and offered the property for rent in order to mitigate damages. Vineyards has been unable to re-let the premises, and has not received any payment for use of the property. Now, Vineyards is seeking damages against RAL in the amount of \$31,020.24 for rents, fees, and taxes due from March of 2016 to the date of the filing of the complaint. Vineyards seeks damages that continue to accrue until the five year end date of the lease in February 2020.

3. Sections 27 and 28 referenced in Vineyard’s letter pertain to remedies and termination provisions. Section 27 reads:

Remedies upon Tenant’s Default. If there should occur any default on the part of the Tenant in the performance of any conditions and covenants herein contained which Tenant does not cure within ten (10) days of receiving notice from Landlord, or if during the term hereof the Premises or any part thereof shall be or become abandoned or deserted, vacated or vacant, or should the Tenant be evicted, the Landlord, in addition to any other remedies herein contained or as may be permitted by law, may either by force or otherwise, without being liable for prosecution therefor, or for damages, reenter, possess, and enjoy the Premises. The Landlord may then re-let the Premises and receive the rents and apply the

same, first to the payment of such expenses, reasonable attorney fees and costs, as the Landlord may have been put to in re-entering and repossessing the same and in making such repairs and alterations as may be necessary; and the second to the payment of rents due hereunder. The Tenant shall remain liable for such rents as may be in arrears and also the rents as may accrue subsequent to the re-entry by the Landlord, to the extent of the difference between the rents reserved hereunder and the rents, if any, received by the Landlord during the remainder of the unexpired term hereof, after deducting the aforementioned expenses, fees and costs; the same to be paid as such deficiencies arise and are ascertained each month (emphasis added).

This Section provides for re-entry by the Landlord and payment of all accrued rent.

Section 28 reads:

Termination on Default. If any of the contingencies set forth in the preceding clause occur, or should the Tenant be adjudicated as bankrupt, insolvent or placed in receivership, or should proceedings be instituted by or against the Tenant for bankruptcy, insolvency, receivership, agreement of composition or assignment for the benefit of creditors, if this lease or the estate of the Tenant hereunder shall pass to another by virtue of any court proceedings, writ of execution, levy, sale, or by operation of law, the Landlord may, at any time thereafter, terminate this lease and the term hereof, upon giving to the Tenant, ten (10) days, notice in writing, of the Landlord's intention so to do. Upon the giving of such notice, this Lease and the term hereof shall end on the date fixed in such notice as if the said date was the date originally fixed in this Lease for the expiration hereof; and the Landlord shall have the right to remove all persons, goods, fixtures, and chattels therefrom, by force or otherwise, without liability for damage (emphasis added).

With notice, the end date of the lease is amended with the named date. The chosen date is considered as if the said date was the date "originally fixed in this lease for the expiration hereof." Moreover, this clause provides that all remedies are cumulative for both parties.

4. At oral argument, the parties agreed that the lease does not have an acceleration clause, which is significant. Generally, no suit can be brought for future rent without an acceleration clause.² This rule reflects the common law perspective that rent is a periodic

² 49 Am. Jur. 2d *Landlord and Tenant* § 642 (2016).

payment for the possession of land.³ The Superior Court has awarded future rent when a commercial lease for a motel had an acceleration clause, and the lease was not terminated.⁴ Without an acceleration clause, the most rent which could be recovered would be on a periodic basis. The Court would have to determine whether the award would be as of filing, decision, or entry of judgment.⁵ However, the premise is an unexpired term of the lease existed at the time of trial.

5. At oral argument, the parties agreed that Sections 27 and 28 are cumulative. There is no objection that notice of a termination date in Section 28 for an uncured default was internally inconsistent with the Section 27 remedies. Essentially, Vineyards asserts the April 4, 2016 date merely is a place holding time, and, nonetheless, it should be able to recover rental installments as of one of the three times mentioned above. When the accounts are liquidated, the lease would be obviously ended. On the other hand, RAL argues that the April 4, 2016 date is conclusive. If Vineyards desired to collect future monthly installments, it could surely have given another time in the notice letter to preserve an unexpired term of the lease.

6. Upon consideration, I agree that these provisions are fully consistent. No ambiguity is present or conflict presented with the cumulative nature of the remedies. They provide flexibility to address the varying circumstances which may arise in a default. Indeed, Vineyards did not have to provide any date, much less the April 4, 2016 one. Under the lease, when a date was selected, the original five year end date was amended to April 4, 2016.

³ 3 Herbert Thorndike Tiffany, *The Law of Real Property* § 903 (1939); 1 *Real Estate Leasing Practice Manual* § 38:11 (2016).

⁴ See *Ojausmani, Inc. v. Patel*, 1994 WL 45443, at *5 (Del. Super. Ct. Jan. 14, 1994).

⁵ See *Bhole, Inc. v. Shore Investments, Inc.*, 67 A.3d 444, 450 (Del. 2013). Like the present case, the lease in *Bhole* did not contain an acceleration clause, but there was an unexpired term left on the lease. The presence of an unexpired term triggered the need for a timing determination by the Court.

7. Further, at oral argument, the parties agreed that no facts are in dispute. Interpretations of contracts/leases present legal questions. Under the plain meaning of the lease, the commercial landlord set the termination date. Consequently, any unexpired leasehold term was thereby eliminated. Vineyards' recovery is limited to accrued amounts before April 4, 2016. Applying the security deposit, nothing further is due.

NOW, THEREFORE, this 7th day of November, 2016, Defendant's Motion to Dismiss is **GRANTED**.

IT IS SO ORDERED.

Richard F. Stokes, Judge

Cc: Prothonotary
Tasha Marie Stevens, Esq.
Mark F. Dunkle, Esq.